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Supreme Court, U.S.

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No.

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI,
MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD.,
MICHAEL TINIK, OLYMPIA ARENAS, INC.,
Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED

Whether there is a *per se* rule that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to the first action?

LIST OF PARTIES AND RULE 29 DISCLOSURE

The parties before the Court of Appeals and this Court are listed in the caption. The corporate Petitioners have no parent or subsidiary companies.

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**RICK KAY, ROBERT FOX, ROBERT CAVALIERI,
MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD.,
MICHAEL TINIK, and OLYMPIA ARENAS, INC.** petition
for a Writ of Certiorari to review the Judgment of the United
States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at
897 F.2d 1375 (1990). The opinions of the District Court (App.
D, F, H) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. C, p. C-1 -
C-2) was entered on March 8, 1990. Pursuant to Supreme Court
Rule 13.1, this petition is timely filed on or before June 6, 1990.
Jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the federal common law of *res judicata*. It does not involve any specific constitutional provision, treaty, statute, ordinance, or regulation.

STATEMENT OF THE CASE

The facts material to this petition are uncontested. Petitioner Olympia Arenas, Inc. ("Olympia") operates the Joe Louis and Cobo Arenas, two facilities in Detroit, Michigan, under an exclusive master lease agreement with their owner, the City of Detroit. Petitioner Prophet Products Ltd. ("Brass Ring") is a concert promoter in the metropolitan Detroit area. In early 1983, Olympia and Brass Ring entered into an arrangement under which they agreed to co-promote live musical concerts at the two arenas. Respondent Cellar Door Productions, Inc. of Michigan ("Cellar Door"), which is another concert promoter in the metropolitan Detroit area, sought access to the arenas under the same co-promotion arrangement that Olympia made with Brass Ring. Olympia denied this request.

In June of 1983, Cellar Door commenced an action in the United States District Court for the Eastern District of Michigan, naming as defendants Olympia and Brass Ring.¹ The Complaint alleged that the Joe Louis and Cobo Arenas were essential facilities for the promotion of arena attractions, and therefore, the arrangement between Olympia and Brass Ring violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. Section 1, *et seq.* (The Sherman Act) (App. K, p. K-6). The Complaint asked for preliminary and permanent injunctive relief against the exclusive arrangement, and money damages. (App. K, p. K-7-K-8). The 1983 Complaint specifically alleged that "The conduct of Defendants. . . (had) recently just begun, is continuing and will continue

¹ A non-existent entity referred to as "Olympia Stadium Corporation, a Michigan corporation" was also named a party defendant (App. K, p. K-1).

unless the injunctive relief as requested herein is granted." (App. K, p. K-5).

After filing the 1983 action, Cellar Door moved for a preliminary injunction against the exclusive arrangement. The District Court denied its motion on August 1, 1983, holding that Cellar Door did not have a strong likelihood of success on the merits because the two arenas did not appear to be essential facilities for the purposes of the Sherman Act. Cellar Door took no future action with respect to the 1983 action, except to enter into a stipulation dismissing the action "with prejudice". On November 7, 1983, the District Court entered an order in conformity with the stipulation, which provided:

IT IS HEREBY ORDERED that the above captioned matter be and the same hereby is dismissed with prejudice and without costs to either party. (App. J, p. J-3).

Thereafter, Petitioners continue to co-promote concert events at the Joe Louis and Cobo Arenas. Respondent Cellar Door likewise continued to promote concerts in the metropolitan Detroit area.

On February 5, 1987, Cellar Door commenced this action, also in the United States District Court for the Eastern District of Michigan. The 1987 Complaint named as defendants Olympia and Brass Ring, along with the other Petitioners² and certain unrelated parties³. Like the 1983 Complaint, the 1987 Complaint alleged that the arrangement between Olympia and Brass Ring violated Section 2 of the Sherman Act. (App. L, p. L-9). Also like the 1983 Complaint, the 1987 Complaint asked for

² The remaining Petitioners are the individual principals of the respective corporate Petitioners. (App. L, p. L-5).

³ The actual caption of the case was *Cellar Door Productions, Inc. of Michigan v. Rick Kay, Robert Fox, Robert Cavalieri, Charles Forbes, Michael Il/Ijitch, Olympia Stadium Corporation, a Michigan corporation; Olympia Arenas, Inc., a Michigan corporation; Prophet Productions Ltd., a Michigan corporation, Michael Tinik, Vincent Bannon, and The Building Group, City of Detroit.*

permanent injunctive relief. (App. L, p. L-11). Finally, like the 1983 Complaint, the 1987 Complaint sought money damages. (App. L, p. L-11). The 1987 Complaint made no allegations of unlawful activity by the Petitioners, other than conduct in furtherance of the exclusive co-promoting arrangement that was the subject of the 1983 action.

Pursuant to a motion, certain of the defendants had the action re-assigned to the Hon. Anna Diggs Taylor, the trial judge who had sat on the 1983 action.⁴ Brass Ring moved for summary judgment on the ground that the dismissal of the 1983 action precluded the later claim under the doctrine of *res judicata*. At a hearing on September 21, 1987, the District Court granted this motion, stating that "there is 1 common nucleus of facts in the entire set of litigation of (the) 2 pieces of litigation," and that therefore "no new cause of action" had arisen since the prior suit. (App. D, p. D-3). Pursuant to its oral decision, the District Court entered an Order Granting Summary Judgment on October 16, 1987. (App. E, p. E-3). Thereafter the other petitioners respectively filed for summary judgment claiming the benefit of the *res judicata* doctrine. The District Court likewise granted these motions by successive oral opinions on October 19, 1987, and entered respective orders of summary judgment on October 29, 1987. (App. G, p. G-3; App. I, p. I-3).

Respondent took a timely appeal against Petitioners to the United States Court of Appeals for the Sixth Circuit. In a decision issued March 8, 1990, the Court of Appeals reversed the District Court's grant of the summary judgments. The Court of Appeals declared that *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), "is controlling", (App. A, p. A-3) and held that, "Each time the arrangement precluded Cellar Door from

⁴In filing the 1987 action, the Respondent failed to make proper disclosure under Local Court Rule 8(c)(3)(ii) in denying on the cover sheet inquiry that the cases have substantially similar evidence. The Lower Court determined that this should have been answered in the affirmative and in this regard upheld the District Court's order of sanction. (App. A, p. A-9).

competitively bidding for an event, a cause of action may have accrued to Cellar Door". (App. A, p. A-6).

This petition followed.

BASIS FOR FEDERAL JURISDICTION IN COURT-OF FIRST INSTANCE

The District Court had jurisdiction under 28 U.S.C. Section 1337, because this is a civil action arising under The Sherman Act 15 U.S.C. 1, and under principles of pendent jurisdiction.

REASONS FOR GRANTING THE PETITION

THERE IS NO *PER SE* RULE THAT A JUDGMENT IN AN ACTION CAN NEVER HAVE CLAIM PRECLUSIVE EFFECT WITH RESPECT TO CONDUCT OCCURRING SUBSEQUENT TO THAT ACTION.

A. Determining The Bounds Of A Claim For *Res Judicata* Purposes Is A Question Of Vital Significance Which Warrants Guidance From This Court.

As this Court declared in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), *res judicata* is a rule of fundamental justice that "... should be cordially regarded and enforced by the courts." This is a principle that is "even more compelling in view of today's crowded dockets." As demonstrated *infra*, its application relates "... to all kinds of litigation" and is "... applied to every category of cases." *Walsh v. International Longshoremen's Association AFL - CIO, Local 779*, 630 F.2d 864 (1st Cir. 1980). In recent years, the Court has addressed a variety of important issues in the area of *res judicata*, including the scope of intersystem preclusion, *Marrese v. American Academy of Orthopedic Surgeons*, 407 U.S. 373 (1985), and of privity, *Montana v. U.S.*, 404 U.S. 147 (1979), and the question of when mutuality is required for estoppel, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 407 U.S. 313 (1971). The Court has, however, given very little guidance in the recent

past to what must be considered the most fundamental question: How should the scope of a claim be ascertained for purposes of determining the claim preclusive effect of a judgment.

This case presents an important aspect of that core question: How should the scope of a claim be ascertained with respect to a continuing practice? This question arises in antitrust cases such as this one, *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), and also in such diverse areas as civil rights, *see: Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966) *Aff'd*, 392 F.2d 120 (1968), patent infringement, *see: The Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305 (Fed. Cir. 1983), contract law, *see: Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355 (4th Cir. 1989), and labor relations, *see: Walsh v. International Longshoremen's Association AFL-CIO*, *supra* — indeed, in any area in which a plaintiff brings an action for the purpose of determining the illegality of a given continuing practice.

The need for guidance on this question is particularly urgent because thirty-five years have passed since this Court's decision in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), the decision deemed "controlling" by the Court of Appeals in this case (App. A, p. A-3). In the intervening years, the law of *res judicata* — and in particular the analytical approach to the determination of claim — has been dramatically transformed. It is, therefore, important that the federal courts be directed by a current expression of this Court's opinion on the subject.

We emphasize at the outset that we do not find the outcome of *Lawlor* irreconcilable with our position, and we do not seek to have that decision overturned. Indeed, if read broadly, as we think it should be, most, if not at all, of the language of *Lawlor* is compatible with the modern, pragmatic approach to claim preclusion. But *Lawlor* is also capable of the narrow, inflexible interpretation placed on it by the Sixth Circuit. Thus, as we will demonstrate in Section B, it has bred conflict and confusion in the lower courts. Guidance from this Court is necessary to resolve the

conflicts, and to encourage federal courts to give ventilation to the modern approach of claim determination.

B. The Court of Appeals' Holding Establishes A *Per Se* Rule Which Is In Conflict With The Better View Of *Lawlor* And With The Law Of Other Circuits, That A Judgment In One Action Can Never Have Claim Preclusive Effect With Respect To Conduct Occurring Subsequent To The First Action.

1. The Court Of Appeals' Per Se Interpretation of *Lawlor*.

The decision of the Court of Appeals in this case was based on the proposition that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to that action. That proposition was necessary to the Court of Appeals' holding because, as acknowledged by the Respondent, the *only* material difference between the present action and the 1983 action was the time period involved.¹

The Court of Appeals held that the element of time was pre-emptively dispositive on the issue of the similarity of claim. Relying on this Court's opinion in *Lawlor*, the Lower Court unequivocally held that "a suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action", *quoting United States v. General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973) (App. A., pp. A-4-A-5). The Court of Appeals interpreted *Lawlor* to create a *per se* rule that time is the exclusive test in determining what is a single cause of action for *res judicata* purposes. Under such a rule, a plaintiff, by bringing

¹This was dramatized in the original argument in the District Court when the attorney for the Respondent argued:

MR. KRAMER: The only difference — and this was critical and determinative, as it will be here — is that different time periods were alleged. And as Chief Justice Warren — and I won't bother to read it because Your Honor has it before you — said, "Different time periods, end of issue, . . ." (App M., p. M-3)

an action, effectively draws an absolute time boundary to its claim, so that in no circumstances may an action seeking a remedy for later conduct be precluded.

In *Lawlor*, the plaintiffs brought an action alleging a conspiracy to monopolize the distribution of advertising posters to motion picture exhibitors. In 1943, before trial, a settlement was reached, and the action was dismissed with prejudice. As summarized by the Court below the plaintiffs brought another action in 1949,

... this time alleging that the prior settlement was merely a device used by the defendants to perpetuate their conspiracy and monopoly. Plaintiffs also alleged that five other producers had joined the conspiracy since the 1943 dismissal, that defendant National Screen had deliberately made slow and erratic deliveries of advertising materials in an effort to destroy plaintiff's business, and that defendant had used tie-in sales and other means of exploiting its monopoly power. (App. A, p. A-3).

This Court held that the 1943 dismissal did not preclude the 1949 action. In reaching that holding — this Court observed: "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." 349 U.S., at 327. The decision did not rest there, however. It pointed to the facts that "[i]n addition, there are new antitrust violations alleged here" and that "[i]n the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly." *Id.* at 328. Additionally, the *Lawlor* opinion dedicated two footnotes describing changed circumstances from the prior action, the first dealing with the alleged tie-in practices, and the second describing the pertinence of the enlarged monopoly. 349 U.S. at 325 n.1, 328 n.5.

According to the Court of Appeals in this case, however, adopting wholesale the conclusion of the *General Electric* decision — "[I]n addition" and "moreover" — indicate that these factors

were merely surplusage, and not essential to this Court's holding. Instead, the Court of Appeals used the earlier-quoted sentence to construct a *per se* rule that a course of conduct subsequent to the first judgment is part of a different cause of action for *res judicata* purposes.

The Sixth Circuit appears not to be alone in recognizing this *per se* rule. See, e.g., *Page v. United States*, 729 F.2d 818, 819-820 (D.C. Cir. 1984) *Joseph Muller Corp. Zurich v. Gazocean International, S.A.*, 394 F. Supp. 1246, 1248-1249 (S.D.N.Y. 1975). Nevertheless this interpretation is squarely in conflict with the better view of *Lawlor* and with decisions of other circuits.

2. The Better View of *Lawlor*

The *Lawlor* Court said: "That both suits involved 'essentially the same course of wrongful conduct' is not decisive." 349 U.S. at 327. The Court did *not* say that such congruity cannot be a *factor* in determining the preclusive effect of the first action and the clear implication of the "not decisive" language is that such congruity can indeed be such a factor. The Court said further that "such a course of conduct — for example an abatable nuisance — may frequently give rise to more than a single cause of action." *Id.* at 328. But this Court did *not* say that such a course of conduct *always* gives rise to more than one cause of action, and the clear implication of the "may frequently" language is that *infrequently* it does not.

It is in this light and in the context of the litany of "new antitrust violations alleged" that one must understand *Lawlor's* statement that the prior judgment "cannot be given the effect of extinguishable claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* at 327. Clearly, in *Lawlor*, the new conduct which arose out of the settlement, was not foreseeable at the time of the first action, and, accordingly, could not have been the subject of the earlier action. But that is not always true. In some cases, it is clear that one *can* sue to remedy injury that has not yet been suffered or conduct that has not yet occurred. Similarly, in some cases of continuing

or recurrent torts, where it appears that the torts will continue indefinitely, a plaintiff may recover damages for the future violations in the same action as that for the past violations. *See: Restatement (Second) Torts*, Section 930(1). Indeed, in some cases, the plaintiff “*must* recover for both past and future invasions in the same action.” *Id.* Section 930(2) (emphasis added). Thus, the *Lawlor* Court’s statement should not be read as creating a *per se* rule that injury suffered after the first action, or attributable to conduct arising after the first action, always gives rise to a new claim.

3. Conflict Between the Sixth Circuit and Other Circuits.

Not surprisingly, other circuits have rejected the Sixth Circuit’s *per se* rule. Indeed, the Court of Appeals in this case acknowledged, (App. A. p. A-5), that its interpretation of *Lawlor* conflicts with that of the Eighth Circuit in *Engelhardt v. Bell & Howell Co.*, *supra*. In *Engelhardt*, as in this case, a prior attempt to bring the same antitrust claim (a continuing refusal to deal) had been dismissed with prejudice. The Plaintiff argued that “even if there is claim preclusion as to all the damages he has sustained up and through the prior actions, he is still entitled to recover for future damages on the ground that there is a continuing conspiracy which creates new causes of action with each invasion of Plaintiff’s interest.” *Id.* at 35. The Eighth Circuit squarely rejected this argument, and in doing so held that *Lawlor* was “readily distinguishable”:

In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged. In our case the parties in all actions are identical and only continuing violations of the type involved in the prior actions and there adjudicated against the plaintiff are asserted. *Id.* at 36.²

²The attempt by the Court of Appeals in this case to distinguish *Engelhardt* as involving “a single breach of contract, only one refusal to deal and only a

The Eighth Circuit's decision in *Engelhardt* does not stand alone in rejecting the Sixth Circuit's *per se* rule. In a very recent case, *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, *supra*, (1989), the Fourth Circuit has done the same. In prior litigation, Eastern had brought claims against Peugeot under the federal Dealer's Day in Court Act and for breach of contract. In the subsequent litigation, initiated by Peugeot, Eastern attempted to assert counterclaims to the similar effect, including an allegation that Peugeot was engaged in a "continuous, unfair, and inequitable scheme" to drive Eastern out of business. The Fourth Circuit noted that:

Eastern alleged virtually the same thing in the 1981 complaint: that since 1978 Peugeot engaged in a whole range of activities with 'intent to coerce, intimidate' and force Eastern out of business. Both of these counterclaims involve many of the same facts actually litigated in the prior suit. *They do, however, contain events that occurred after the 1981 suit.*" *Id.* at 359 (emphasis added).

This was not enough to prevent preclusion of the claims however, as the Fourth Circuit held: "We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation." *Id.* In other words, the Fourth Circuit has recently held — contrary to the decision of the Court of Appeals in this case — that there is no *per se* rule that the continuation of the challenged conduct after the initial action bars claim preclusion.

The First Circuit, in *Walsh v. International Longshoremen's Association, AFL-CIO, Local 799*, *supra*, has also explicitly indicated its disagreement with the *per se* rule. Prior litigation had decided that the National Labor Relations Board did not have

single transaction," (App. A., p.-5), quoting *General Electric*, 358 F. Supp. at 740 n.9, is unavailing. As indicated above, the plaintiff in *Engelhardt* alleged a continuing refusal to deal, and the Eighth Circuit decided the case on the continuing tort basis.

jurisdiction over a dispute concerning the ILA's refusal to handle Soviet cargo. In *Walsh*, the Board cited *Lawlor* and two lower court cases in support of the argument that each refusal to handle gave rise to a distinct cause of action. The Court of Appeals refused to accept this argument:

In each of these cases, a previous judgment was held not to bar an action based on conduct of the same nature as that originally alleged. But in each case, the subsequent conduct was broader and more far-reaching than the conduct which led to the original complaint. Here, there is no broadening of the pattern of conduct. Rather, the conduct in each instance is the same; each ILA local simply follows the announced policy of the national union when it is asked to work on Soviet cargo. *To be sure, the particular application of union policy involved in this case had not occurred at the time of the Baldovin suit, and it had not therefore given rise to a cause of action which could have been sued on at that time. But the ILA's policy was announced on January 8, 1980, well before the instigation of the Baldovin suit. In Baldovin, the Board sought to enjoin that policy and all conduct in furtherance of it. We think, therefore, that it was that policy, and the resulting pattern of conduct, which gave rise to the cause of action in Baldovin, and again in this case.*" *Id.* at 873. (emphasis added).

Although the case was ultimately decided on collateral estoppel grounds, this passage clearly reflects that the First Circuit found the Sixth Circuit's *per se* rule unpersuasive. And the First Circuit has since confirmed this conclusion. In *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1 (1st cir. 1983), that court cited *Walsh* for the proposition that *Lawlor* [is] "limited to cases where 'subsequent conduct was broader and more far-reaching than the conduct which led to the original complaint.'" *Id.* at 2.

To similar effect is a District Court case, *Neeld v. National Hockey League*, 439 F. Supp. 446 (W.D.N.Y. 1977). There, a one-eyed hockey player sued the NHL and its member

franchises, alleging antitrust violations because of his exclusion from the league. In holding the action barred by a prior one, the court explicitly followed *Engelhardt* and adopted the broad view of *Lawlor*.

The instant complaint does not allege that defendants' conduct occurred solely after the entry of judgment in the California action but merely alleges that defendants have continued to deprive plaintiff of employment opportunities in the NHL subsequent to the commencement of the California action. Furthermore, there are no allegations which can be construed to assert new antitrust violations which did not exist at the time of judgment in the California action and no allegations are made that in the interim period there has been any substantial change in the scope or extent of defendants' adherence to Section 12.6. See, *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964)."

Accord, Commonwealth of Pennsylvania v. Brown, supra; at 326, (applying claim preclusion to a subsequent suit seeking to end a "... continuing policy of restrictive admissions ..." because "the original purpose of the earlier proceeding was to end the discrimination" and "[n]othing new has occurred ..." that would make the policy any more violative than it was previously).

Other cases, while not necessarily presenting the issue so expressly, nevertheless make clear their belief that, as stated by Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4409 (1981), "[c]laim preclusion should apply ... if the object of the first proceeding was to establish the legality of the continuing conduct into the future." For example, in *Carr v. United States*, 507 F.2d 191 (5th Cir. 1975) *cert. denied* 422 U.S. 1043 (1975), a retired serviceman claimed a right to a higher rate of disability pay than the government was awarding him. He lost one litigation, and several years later commenced another, raising constitutional arguments. The Fifth Circuit held the later action barred by *res judicata*, holding:

The acts complained of — the government's refusal to award a higher rate of retirement pay — are identical. No material facts have been alleged that were absent from the Court of Claims deliberations. In essence, the only difference is appellant's theory of recovery." *Id.* at 193.

Similarly, in *Roy v. City of Augusta, Maine*, 712 F.2d 1517 (1st Cir. 1983), the Plaintiff claimed to have rights of first refusal to a pool hall he had previously owned. He sued in state court, seeking to have the license granted another person declared void, but lost. He then brought a federal action under 42 U.S.C. Section 1983, seeking damages presumably up to the date of that action. The First Circuit held the claim barred:

Under modern principles of *res judicata*, a party cannot split his claim by first seeking one type of remedy in one action and later asking for another type of remedy in a second action. See *Restatement (Second) of Judgments* Sections 24 and 25. *Id.* at 1521.

4. Uncertainty in the Circuits

Not only are the various circuits in conflict about the scope of claim preclusion in cases of continuing conduct, but they have expressed a good deal of uncertainty on this issue.

a. The Federal Circuit

In this regard, *The Young Engineers, Inc. v. International Trade Commission*, *supra*, is illustrative. There, the Federal Court described *Lawlor* as a case

where a second antitrust suit was held to be not barred because the acts complained of in the second suit were all subsequent to the first, the acts were "new" violations of a different nature, and the defendant's monopoly had substantially increased. *Id.* at 1313

This summary suggests that the Federal Circuit found the broad view of *Lawlor*, the one adopted by cases such as *Engelhardt*, hospitable. And, although the Court rejected the applicability of

claim preclusion in the case before it, it did so under that broad view:

Even under the broad view that a claim may embrace continuing conduct subsequent to the judgment, we find no authority that claim preclusion would apply to conduct of a different nature from that involved in the prior litigation. *Lawlor v. National Screen Service Corp.*, *supra*, is clearly to the contrary. *Id.*, at 1316.

Thus, *The Young Engineers* might plausibly be read as adopting the broad view of *Lawlor*. At the very least, by applying that rule, the Federal Court indicated that it was not persuaded that the *per se* view of *Lawlor*, the one enunciated by the Court of Appeals in this case, is correct.

b. The Ninth Circuit

In two very recent cases, the Ninth Circuit has also manifested uncertainty over the scope of *Lawlor*. The first, *California v. Chevron Corp.*, 872 F.2d 1410 (9th Cir. 1989) *Petition for cert. filed*, __ U.S. __, involved appeals from two separate actions. The District Court had held that its dismissal of the earlier claims required dismissal on *res judicata* grounds of some of the later claims, which involved substantially the same allegations but involved a later period. The Ninth Circuit, by reversing the District Court judgments in the earlier action, undercut the basis for the District Court's judgment in the later action. But the Ninth Circuit made a special point of indicating its uncertainty about the applicability of *res judicata*:

[I]t is unclear whether the prior federal judgment in this case actually would have operated as a *res judicata* bar to the state law claims being brought. A judgment covering an earlier time period need not necessarily operate as a *res judicata* bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1955). Simply alleging the same type of claims against the same defendants for a

later period *does not guarantee* a *res judicata* bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered. *Id.* (emphasis added).

The Ninth Circuit seems rather clearly not to have read *Lawlor* as prescribing a *per se* rule against claim preclusion. The Court's concern to establish that a continuing course of conduct "need not necessarily operate as," and "does not guarantee" a *res judicata* bar, suggests that it did not contemplate that *res judicata* could *never* apply to a continuing cause of action. In any event, the Ninth Circuit made explicit, in the first sentence of this quoted passage, its uncertainty about the scope of claim preclusion in cases of this type.

That uncertainty was manifest again in *Harkins Amusement Enterprises v. Harry Nace Co.*, 890 F.2d 181 (9th Cir. 1989). The Ninth Circuit's opinion, which denied application of *res judicata*, is rather cryptic. But the Court did not rest simply on the fact that "the plaintiff alleges conduct that occurred in a different time period" from the prior litigation, *Id.* at 183; it also relied on its perception that "the plaintiff alleges facts which by the defendant's own concession are at least 10 percent different from the facts alleged in *Harkins I*," *Id.*

c. *The First Circuit*

The First Circuit has also expressed the uncertainty that pervades this area. That Court avoided deciding *Pignons*, *supra*, on ground of claim preclusion, explaining that this

... is a concept which we hesitate to apply in this case because of the ambiguities surrounding its applicability to situations of ongoing wrongful conduct. *Compare Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326-28, 75 S. Ct. 865, 867-68, 99 L.Ed.2d 1122 (1955) (*res judicata* does not bar suit based on acts occurring after previous suit for 'essentially the same course of wrongful conduct') with *Walsh v. International Longshoremen's Association*, 630 F.2d 864, 873 (1st Cir. 1980) (*Lawlor* is limited to cases where 'subsequent conduct was broader and more far reach-

ing than the conduct which led to the original complaint.').
Id at 2.

Those "ambiguities" are obviously troubling to the lower courts. This Court should resolve the ambiguities by clarifying the applicability of claim preclusion to cases of continuing conduct.

C. The Court of Appeals' *Per Se* Rule is Incompatible With Modern Conceptions of Claim Preclusion.

1. The Modern Approach To Claim Preclusion Depends On A Pragmatic Conception Of The Bounds Of A Claim.

One reason for the lower courts' uncertainty about the scope of claim preclusion in cases of continuing conduct is that *Lawlor*, this court's last word on the subject, was decided thirty-five years ago, in a bygone era. The prevailing guide at that time to *res judicata* law, cited pervasively by *Lawlor*, 349 U.S. at 326 n.6, 328 n.12,14, 329 n.16,18,19, 330 n.21, was the first Restatement of Judgments which had been adopted in 1942, before modern concepts of civil procedure — such as the merger of law and equity and liberal provisions of joinder — had fully evolved. As explained by the Reporters of the Restatement (Second) of Judgments, in their Introduction, at 6 (1982):

Decisions in the modern law of *res judicata* have been, or at least should have been necessarily shaped by the statutory provisions of the system of civil procedure. This relationship was not always fully appreciated. In particular, the decisional law of *res judicata* took only belated account of major legislative changes in the law of civil procedures, notably the adoption of the Field Code in the middle of the 19th Century and the adoption of the Federal Rules in the middle of this century. Thus, despite introduction of the concept of the single form of action in the Field Code, the courts persisted in defining 'cause of action' for *res judicata* purposes in terms of the common law forms of action. A century later, when the Field Code was supplanted by the Federal Rules of Civil Procedure, the courts' adherence to anachronistic rules of *res*

judicata repeated itself, this time in the application of *res judicata* concepts based on Code pleading to judgments produced through Federal Rules procedure. This same difficulty left its mark on the first Restatement of Judgments. That Restatement, published less than four years after the Federal Rules had been adopted for the federal courts, was based on cases decided under the codes.

Since 1955, when *Lawlor* was decided, there has been a dramatic transformation in the law of *res judicata*, as exemplified by the Restatement (Second) of Judgments. The Second Restatement manifests a significantly broader and more flexible approach to claim preclusion. *See Id.*, comments, a,b to Section 24, at 196-98. Under that approach, preclusion generally applies to rights that arise out of the same "transaction, or series of connected transactions," Section 24(1), and what constitutes a "transaction" or a "series" is "to be determined pragmatically," depending on numerous factors, Section 24(2).

In *Nevada v. United States*, 463 U.S. 110, 130-31 n.12 (1983), this Court approvingly referred to the "more pragmatic approach" of the Second Restatement, and implies that its standards should now prevail. Nevertheless, it was unnecessary to decide the issue there, because the Court concluded that the result would be the same under either Restatement. *Id.* at 131 n.12 Several circuits, however, have adopted the transactional approach. *E.g.*, *Kurzweg v. Marple*, 841 F.2d 635, 640 (5th Cir. 1988). *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir.) (citing other opinions adopting approach). It is clearly "the present trend among courts nationwide." *Hagee v. City of Evanston*, 729 F.2d 510, 513 n.5 (7th Cir. 1984). And while other decisions look for a common nucleus of operative facts *e.g.* *Robbins v. District Court of Worth County*, 592 F.2d, 1015, 1017-1018 (8th Cir. 1979) *cert. denied*, 444 U.S. 852 (1979), as *Wright, Miller and Cooper* have observed, the impetus in most decisions is to displace the earlier formulas and work "... toward the transactional approach ...". *Id.* at Jurisdiction Section 4407.

In this case the Court of Appeals made no reference in its discussion of the claim preclusion question to the Second Restatement or the transactional test. And of the few cases that the Court of Appeals cited, none either cited or applied the Second Restatement or the transactional test. This omission is particularly significant since it dramatizes the inherent problem created by the *per se* approach. In *James v. Gerber Product Company*, 587 F.2d 324, 328 n.5 (6th Cir.) the Lower Court recognized the modern approach of claim determination, observing, "In recent years the Courts have defined the term 'claim' for *res judicata* purposes in an expansive manner", and citing the Restatement (Second) of Judgments applied the transactional test to the facts before it stating: "We find that the 1966 and 1968 sales of Gerber stock were connected transactions which gave rise to a single claim". *Id.* Here, however, the *per se* rule pre-empts the modern analytical approach, fixating the concept of claim to a prior era. The establishment of the mechanical *per se* rule is therefore incompatible with the modern pragmatic approach to claim preclusion.

2. Under the Modern Approach To Claim Preclusion, An Action Brought To Determine The Legality Of A Practice May, In An Appropriate Case, Preclude A Later Action Brought To Determine The Legality Of The Same Practice.

Often, when successive actions challenge a similar course of conduct, some material facts will change from one action to the other. When that is so, the judgment in the first action ordinarily cannot preclude the second claim. Such differences between the two actions account for the results in *Lawlor*, as explained *supra* pp. 9-10, and in such cases as *The Young Engineers*, *supra* p. 14, and *Harkins*, *supra* p. 16, in which the Ninth Circuit emphasized that "the plaintiff alleges facts which . . . are at least 10 percent different from the facts alleged in [the prior action]," 890 F.2d at 183.

But this is not always true. Sometimes, the course of continuing conduct remains unchanged in all material respects from one

action to another. Such cases arise frequently. *Englehardt, supra* p. 10, *Walsh supra* p. 11, and *Peugeot, supra*, p. 11, are all examples. And, as further discussed below, the present case is particularly pristine in this respect.

The question, then, is whether the mere fact that the second action asks for damages for a different time period from the first makes what would otherwise be one claim into two, and thus bars application of claim preclusion. We believe that modern concepts of claim preclusion foreclose such a conclusion.

The Second Restatement's basic rule of claim preclusion, in Section 24, explicitly recognizes that a single claim may have continuity over time. Thus, preclusion applies not only to a "transaction", but also to a "series of connected transactions", Restatement (Second) of Judgments Section 24(1). The "series" terms is not mere surplusage, *see: Petromanagement Corp. v. Acme-Thomas Joint Venture, supra*, 1336 (10th Cir. 1988) (declining to decide that two actions arose out of the same transaction, but holding the second precluded on the ground that they did arise out of a same "series of transactions".) Furthermore, in determining "pragmatically" what "groupings" constitute a "transaction" or a "series", courts are to

giv[e] weight to such considerations as *whether the facts are related in time, space, origin, or motivation*, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. Restatement (Second) of Judgments Section 24(2) (emphasis added).

As an illustration, assume in this case that the first action was brought in 1985 rather than 1983, but that it only sought damages for the period prior to 1983. If the plaintiff later brought another action seeking damages for the period from 1983 to 1985, it would clearly be precluded, *e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982). There could be no plausible contention that because

the 1983-85 damages were part of a different time period they formed a different claim and so were not precluded.

This demonstrates the inappropriateness of language such as that quoted by the Court of Appeals, (App. A., p. A-5), from *Ohio-Sealy, supra*, 669 F.2d at 494, to the effect that "[i]n the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff". As demonstrated by Judge Goodrich's opinion in *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, (3rd Cir. 1950), this statement is true in the context of determining the applicability of a statute of limitations to continuing conduct — even if a course of conduct began long before the statutory period, the plaintiff has a claim for conduct occurring within that period — but it has no relevance in determining the entirely separate question of claim preclusion. *Accord: Neeld v. National Hockey League, supra*, p. 12. It is significant in this respect that *Ohio-Sealy* relied in large part on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), a statute of limitations case. It simply is not true that a plaintiff may divide a series of transactions into numerous time periods, and then sue separately on each one, on the ground that each time the defendant engaged in the challenged conduct it gave rise to a separate cause of action.

The question, then, is whether by bringing an action at a given time a plaintiff must necessarily be deemed to have validly split what would otherwise be one claim, so that the plaintiff may bring separate suits challenging the same course of conduct, even though no material facts have changed between the two periods. As shown above in Section B, numerous cases support the proposition enunciated in Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4409 (1981), that "[c]laim preclusion should apply . . . if the object of the first proceeding was to establish the legality of the continuing conduct into the future."

The applicability of this proposition does not depend on whether the case is an appropriate one for "permanent" damages.

On this point the Seventh Circuit case of *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119 (7th Cir. 1981), is instructive. There, the plaintiff had failed in an earlier action to establish his right to certain benefits. In the later action, he claimed those benefits for the period subsequent to the first action. He contended that — because under the controlling Illinois law these claims had not yet accrued at the time of the first action, and so could not be presented in that action — the claims could not be precluded by the first action. The Seventh Circuit responded succinctly:

This theory confuses the issues of liability and damages . . . While the individual items of damages may not have yet accrued at the filing of the first suit, the question of the defendant's liability for the fringe benefits had clearly accrued and was ripe for decision . . . The question could have been resolved either by declaratory and injunctive relief or by a determination of liability which would have been res judicata in suits for future installments." *Id.* at 122.

In other words, under modern concepts of claim preclusion, the question of what claims could have been presented for damages in the first action need not be inextricably tied to the question of what claims are precluded by that action. Where the first action is brought to determine the legality of a continuing practice, the question of liability may be resolved, so that after-accruing claims based on continuation of the same practice without material change will be precluded. To the extent, if any, that *Lawlor's* language about "claims which did not even then exist", 349 U.S. at 328, *see supra* p. 9, is inconsistent with this proposition, *Gasbarra* indicates that it is incompatible with modern principles of claim preclusion.

It bears emphasis that this is not an argument based on issue preclusion. That is, the premise of the argument is not that the first action establishes facts that must be taken as given in a second action. Rather, the premise is that judgment in the first action establishes the legal status of given facts, so that *if* the facts in the second action are materially the same, relitigation of that

legal status is precluded. If the facts in the second action are not materially the same, then obviously claim preclusion does not apply. *Cf. California v. Chevron Corp.*, *supra* at 1415 (9th Cir. 1989) ("Simply alleging the same type of claims against the same defendants for a later period does not guarantee a *res judicata* bar, because factual matters, such as the conduct of parties since the first judgment, must be considered.").

D. The Court of Appeals' *Per Se* Rule Fails To Consider The Fact That The Prior Judgment Was Entered By Consent, And So Impedes Settlement Of Claims Concerning Continuing Conduct.

1. The *Per Se* Rule Frustrates Another Mechanism For Claim Determination.

The Court of Appeals in adopting a mechanical test for claim preclusion failed to take into account that the original action had been dismissed "with prejudice" by stipulation of the parties. The failure to address this factor ignores the fundamental principle that when a case is dismissed by consent of the parties the preclusive effect of the dismissal should be measured by the intent of the parties. Wright, Miller and Cooper, *supra* Jurisdiction Section 4443, p. 384.

Further, in stipulated matters, preclusion may extend to claims not formally presented. For instance, *In The Matter of Engineering Co-Op, Inc.*, 814 F.2d 1226, 1234 (7th Cir. 1987), the Court recognized that a party seeking to assert a claim in a second litigation has the burden of clarifying the scope of the dismissal with prejudice in the first action. Similarly, a stipulation can expressly give defendant "... fair warning of a later suit". *Torres v Rebarchak*, 814 F.2d 1219 (7th Cir. 1987). The *per se* rule invoked by the Lower Court dispenses with this process of claim determination. By its reliance on *Lawlor* which did not address its stipulation of dismissal, and its adherence to a *per se* rule, the Lower Court foreclosed itself from this vital inquiry.

2. By Rejecting A *Per Se* Rule Attendant Policy Considerations of Are Facilitated.

This Court has unequivocally expressed, "... a clear policy favoring settlements, *Marek v. Chesney*, 473 U.S. 1, 10 (1984), *Evans v. Jeff D.*, 475 U.S. 717, 732-733 (1985). By rejecting the *per se* rule, this policy would be fostered, along with the allied policy underlying the principle of *res judicata* which is "... to protect a defendant from the harassment of multiple actions". *Calderon Rosado v. General Electric Circuit Breakers*, 805 F.2d 1085 (1st Cir. 1986). Finally, by retaining this analysis rather than pre-empting it, the burden of preserving the claim would continue to be placed on the plaintiff since the plaintiff is exclusively in a position to circumscribe the scope of the stipulation. A defendant, on the other hand, must acquiesce in the stipulation of a plaintiff to dismiss with prejudice since "... no matter when the dismissal with prejudice is granted, it does not harm the defendant: the defendant receives all that he would receive had the case been completed". *Schwartz v. Folloder*, 767 F.2d 125, 129 (5th Cir. 1985), *see also: Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964).

E. This Case Is An Appropriate One In Which To Establish That The Court Of Appeals' *Per Se* Rule Is In Error.

We have demonstrated that there is considerable conflict and uncertainty among the circuits as to whether the *per se* rule applied by the Court of Appeals is correct, and that this rule conflicts with the better understanding of *Lawlor* and with modern principles of *res judicata*. It is therefore important that this Court resolve the issue. The following demonstrates that this case is an appropriate one in which to do so.

1. Except For The Time Element, The Actions Are Identical.

Respondent brought the 1983 action to challenge the legality of a particular business arrangement — the co-promotion arrangement made by Olympia and Brass Ring in 1983. The current

action challenges the legality of the same arrangement. Thus, the case is similar to others such as *Engelhardt*, *supra* p. 10, *Peugeot*, *supra* p. 11, and *Walsh*, *supra* p. 11 — cases in which three different Courts of Appeals have provided strong support for the Wright, Miller & Cooper proposition that “[c]laim preclusion should apply . . . if the object of the first proceeding was to establish the legality of the continuing conduct into the future”, *supra* p. 13.

Respondent does not allege in the 1987 Complaint that the petitioners’ conduct or the underlying circumstances are different in any material respect from those alleged in the 1983 action. Indeed, Respondent has acknowledged that the *only* material difference between the 1983 and 1987 actions is that they ask for damages for different time periods. See: footnote 1. p. 7 *supra*. And this difference in time period is the *only* basis on which the Court of Appeals held claim preclusion improper.

The case is therefore pristine: Unlike cases such as *Lawlor* and *The Young Engineers*, *supra* p. 14, it presents no allegations of new types of unlawful conduct that would render claim preclusion inappropriate. Nor are there any allegations that any other material facts — such as the market environment — altered between the two actions in a way that would give Respondent in 1987 a valid claim that it did not have in 1983.

2. The 1983 Action Sought A Remedy Extending Into The Future.

The 1983 action, like this one, demanded injunctive relief against continuation of the challenged business arrangement. Thus, not only is the 1987 action based on the identical conduct under the same arrangement as was the 1983 action, but to a large extent the two actions ask for the very same relief.

This demand for injunctive relief in the 1983 action was based on the allegation that the petitioners’ conduct was a continuous course of action likely to continue if not restrained. (App. K, p. K-7-K-8). Thus, there can be no real doubt — that the conduct that is the subject of the two actions is part of the

same "transaction" or "series of transactions". The demand for injunctive relief in the 1983 Complaint emphasizes that the earlier action placed squarely in contention the future validity of the exclusive arrangement. The Respondent ought not be allowed to relitigate that legal question.

3. The Prior Action Was Dismissed With Prejudice.

Had the judgment in the 1983 action been in Respondent's favor, the legal question would have been resolved, as pointed out by *Gasbarra, supra*, p. 22, 655 F.2d at 122, either by injunctive relief or by a determination of liability that the Respondent could have used collaterally in case of future violations; obviously, the Respondent's right of action for such future violations would have been preserved, and Petitioners would not have gained a future immunity, *see, e.g., Ohio-Sealy, supra* p. 20 (plaintiff that had won damages held not precluded from filing a new action seeking damages for post-verdict violations).

In fact, the judgment in the 1983 action was in Petitioners' favor; that judgment should be deemed to have resolved the question of whether they can pursue the same conduct that was the subject of the earlier action. This case is thus an ideal one for establishing that in appropriate circumstances a judgment might preclude an action seeking damages for identical conduct continuing after the first action.

4. The Prior Action Was Dismissed By Consent.

Because the dismissal of the 1983 action was by consent, this case provides a proper vehicle for the Court to examine and give direction in the area of construing the claim preclusive effect of stipulated dismissals with prejudice.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

T. PATRICK FREYDL

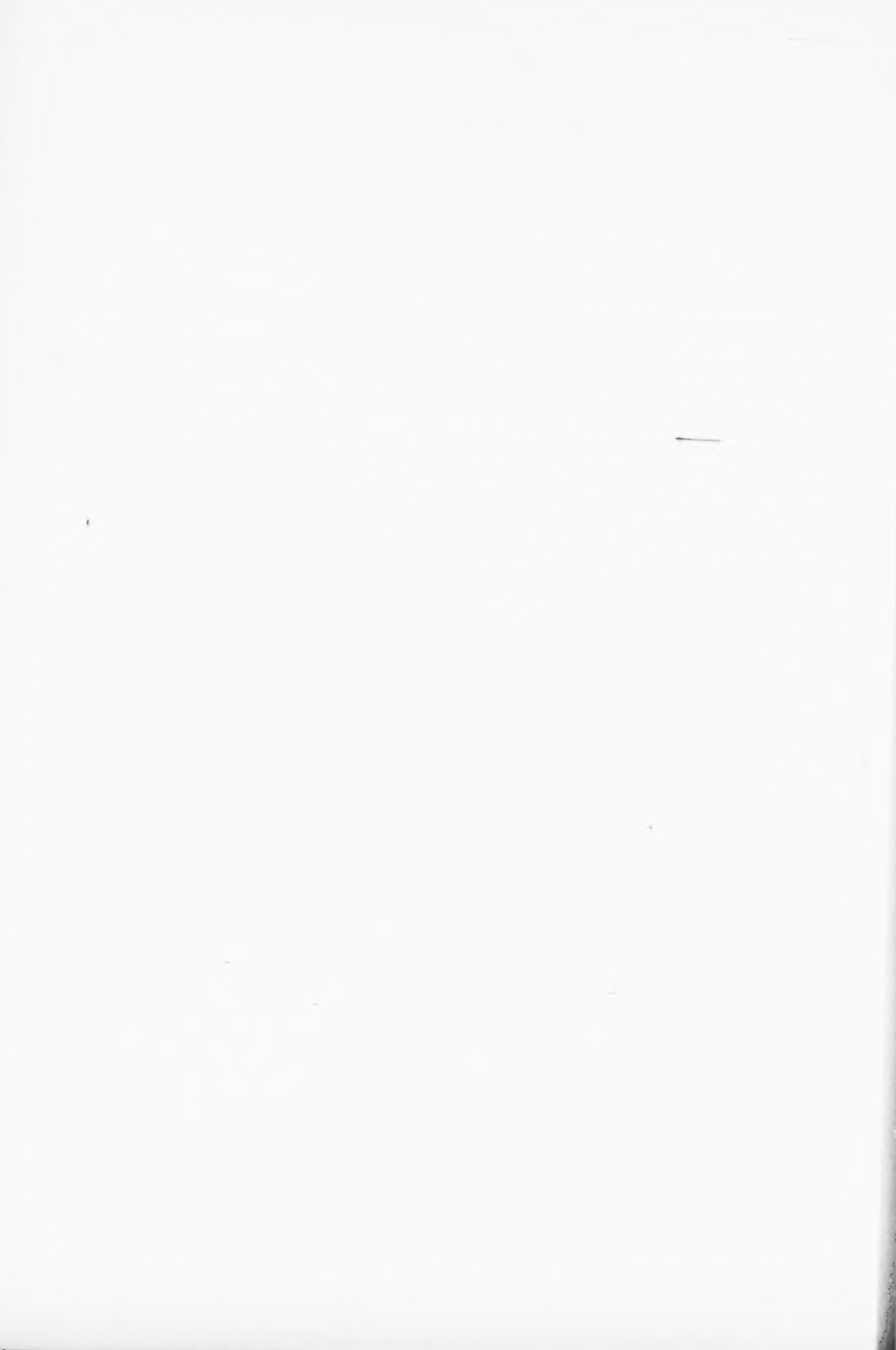
Counsel of Record for Petitioners

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(313) 647-6860



No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI,
MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD.,
MICHAEL TINIK, OLYMPIA ARENAS, INC.,
Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Respondent.

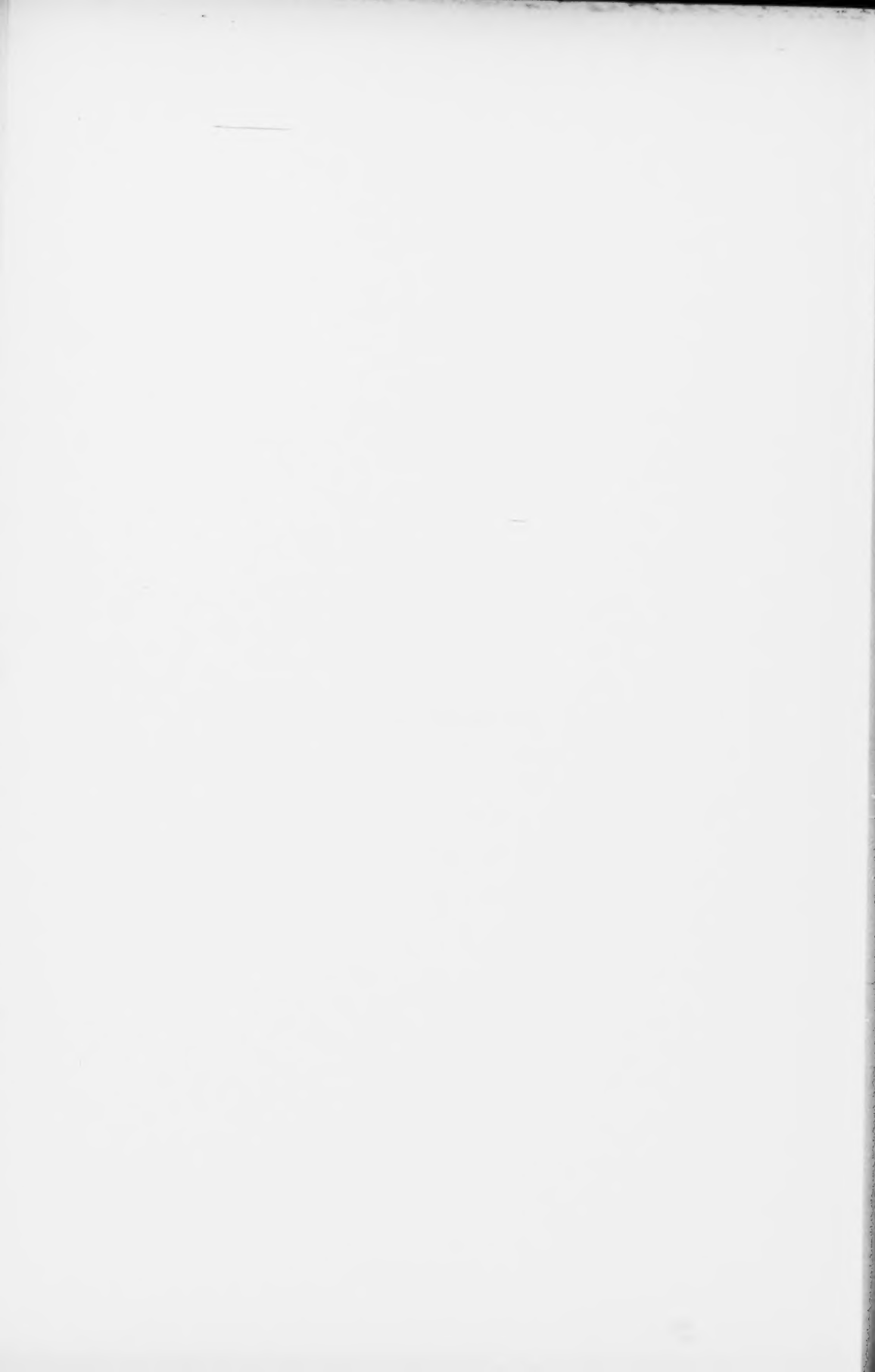
APPENDIX

T. PATRICK FREYDL*
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APPENDIX A



United States Court of Appeals

FOR THE SIXTH CIRCUIT

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN,

Plaintiff-Appellant,

v.

RICK KAY, ROBERT FOX, ROBERT
CAVALIERI, CHARLES FORBES,
MICHAEL ILLITCH, OLYMPIA
STADIUM CORP., PROPHET
PRODUCTIONS, LTD., MICHAEL
TINIK, VINCENT BANNON, THE
BUILDING GROUP, OLYMPIA
ARENAS, INC.,

Defendants-Appellees,

CITY OF DETROIT,

Defendant.

ON APPEAL from the
United States District
Court for the Eastern
District of Michigan.

Decided and Filed March 8, 1990

Before: KENNEDY and NELSON, Circuit Judges; and WISEMAN, Chief District Judge.*

KENNEDY, Circuit Judge. Appellant Cellar Door Productions, Inc. appeals the grant of summary judgment on *res judicata* grounds in favor of appellees Rick Kay, Robert Fox, Prophet Productions, Ltd., and Michael Tinik (Brass Ring), and Robert Cavalieri, Michael Illitch, and Olympia Arenas, Inc. (Olympia) in this antitrust action. Appellant also appeals the District Court's order granting sanctions pursuant to Fed. R. Civ. P. 11 in favor of Brass Ring and Olympia.

We find reversible error in the District Court's order granting summary judgment for appellees. We also reverse the District Court's orders granting sanctions against appellant with respect to the taking of out-of-state depositions while appellees' dispositive *res judicata* motion was pending, and affirm with respect to the motion for reassignment.

Cellar Door and Brass Ring are competitors in the concert promotion industry. Olympia, through its lease with the City of Detroit, operates the Joe Louis Arena and the Cobo Arena in downtown Detroit. Olympia and Brass Ring have entered into an arrangement for the promotion of musical events at the arenas. During the time period in question, they were the only arenas in Detroit and their rental was alleged to be a relevant market. Cellar Door alleges that because Olympia does not offer the arenas to it on the same rental terms as it offers them to Brass Ring, Brass Ring is able to offer performers more financially attractive terms than is Cellar Door. Therefore, Cellar Door alleges, the arrangement between Olympia and Brass Ring has effectively precluded Cellar Door from competing with Brass Ring in the Detroit market.

* The Honorable Thomas A. Wiseman, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

In 1983, Cellar Door instituted an antitrust action against Olympia and Brass Ring based on the same arrangement. That action was dismissed with prejudice by stipulation of the parties. In the present action, Cellar Door complains of antitrust violations that occurred subsequent to the dismissal of the 1983 action.

We first consider appellant's contention that the District Court erred in granting appellees' motion for summary judgment on *res judicata* grounds. The Supreme Court case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), is controlling. In *Lawlor*, the plaintiffs brought an antitrust action in 1942 alleging that the defendants, National Screen and three producers, had conspired to establish a monopoly in the distribution of advertising posters to motion picture exhibitors through the use of exclusive licenses, and that the plaintiffs' business had been injured as a result. In 1943, prior to trial, that suit was settled and dismissed with prejudice. *Id.* at 324. The settlement was based upon an agreement by National Screen to furnish plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements. In 1949, the plaintiffs brought another antitrust action, this time alleging that the prior settlement was merely a device used by the defendants to perpetuate their conspiracy and monopoly. Plaintiffs also alleged that five other producers had joined the conspiracy since the 1943 dismissal, that defendant National Screen had deliberately made slow and erratic deliveries of advertising materials in an effort to destroy plaintiffs' business, and that defendant had used tie-in sales and other means of exploiting its monopoly power. *Id.* at 325. The Supreme Court held that the latter suit was not barred by *res judicata* because the two suits were not based on the same cause of action. *Id.* at 327. The Court noted:

That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct—for example, an abatable nuisance—may frequently give rise to more than a single cause of action While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims

which did not even then exist and which could not possibly have been sued upon in the previous case.

Id. at 327-28 (footnote omitted).

Appellees argue that the differences between the 1942 complaint in *Lawlor* and the latter *Lawlor* complaint as well as differences in the circumstances surrounding the two complaints render the *Lawlor* decision inapplicable to the case at hand. Olympia and Brass Ring are correct that circumstances had changed during the period of time between the two suits in *Lawlor*. Because the defendant National Screen had entered into agreements with five additional motion picture producing companies, the complaint filed in the 1949 action included these companies as additional defendants. The latter complaint also alleged that there had been deliberate slowdowns on the delivery of materials under the license agreement entered into in settlement of the original action. The latter complaint further alleged that defendant National Screen had implemented an unlawful tie-in arrangement. Olympia and Brass Ring are incorrect, however, in their conclusion that these differences render *Lawlor* inapplicable to their case. The Court merely noted that "[i]n addition, there are new antitrust violations alleged here," and that "[i]n the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly." *Lawlor*, 349 U.S. at 328 (emphasis added). The language of *Lawlor* indicates that the decision is predicated on the finding that both suits were not based upon the same cause of action.

Other courts have similarly interpreted *Lawlor*, although in cases not involving a prior voluntary dismissal with prejudice. The Southern District of New York, for example, in *United States v. General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973), stated:

G.E. seeks to distinguish *Lawlor* upon the ground that in the second suit there were also additional allegations as to some new acts which it was claimed the defendants had committed since the earlier judgment. But, in my view, this was merely

an additional reason why *res judicata* did not apply. It did not limit the Court's holding that a suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action.

The Seventh Circuit has also followed *Lawlor* insofar as it held that "[i]n the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff." See *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982).¹

The facts of the case before us are similar to those of *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). *Cream Top* involved an action alleging a continuing scheme to violate antitrust laws subsequent to a prior dismissal with prejudice. In that case, we relied upon *Lawlor* in reversing the District Court's order granting summary judgment on *res judicata* grounds. We noted, "[a]t least insofar as the complaint alleges violations since the dismissal of the [first] case, the judgment in that case cannot be given the effect of extinguishing a claim which arose subsequent to that judgment." *Id.* at 363 (citing *Lawlor*, 349 U.S. 322). Although *Cream Top* was based upon an alternative holding as well,² we concluded that with respect to the price discrimination allegations, "[t]he wrongful conduct charged in this case is composed of a multitude of separate transactions alleged to have been discriminatory. Each such transaction or

¹ In *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), the Eighth Circuit found the new defendants and new antitrust violations necessary to the *Lawlor* holding. In that case, however, "both suits were based on a single breach of contract, only one refusal to deal and only a single transaction." *General Electric*, 358 F. Supp. at 740 n.9. We are unable to agree with the Eighth Circuit's interpretation of *Lawlor*.

² Because the prior case was a state court action, it did not involve a claim under the federal antitrust statutes. We concluded, therefore, that the District Court's dismissal with prejudice could not have adjudicated the alleged violations of those statutes. Thus the latter action alleging federal antitrust violations could not be barred by *res judicata*.

group of transactions, is proved to have the effects proscribed by the Robinson-Patman Act, might be held to be a separate legal wrong." *Id.* at 364.

In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action that arose subsequent to the 1983 dismissal are not barred by *res judicata*. Accordingly, we must reverse the District Court's order granting summary judgment in favor of appellees.

Appellant also challenges the District Court's award of Rule 11 sanctions to appellees Olympia and Brass Ring. The court found that appellant had violated Rule 11 by (1) taking out-of-state depositions during the pendency of appellees' summary judgment motion and (2) violating local Rule 8c.1 as well as the corresponding directive on the Eastern District of Michigan civil cover sheet. Appellees failed to answer in the affirmative either of the following questions posed on the civil cover sheet:

PURSUANT TO LOCAL COURT RULE 8(c) (3) (i)

(a) IS THIS A CASE THAT HAS BEEN PREVIOUSLY DISCONTINUED OR DISMISSED WITHOUT PREJUDICE OR REMANDED TO A STATE COURT?

___ YES ___ NO

(b) IF YES GIVE THE FOLLOWING INFORMATION:

COURT: ___

CASE NO: ___

ASSIGNED

JUDGE: ___

PURSUANT TO LOCAL COURT RULE 8(c)(3)(ii)

(a) OTHER THAN STATED ABOVE, ARE THERE ANY PENDING OR PREVIOUSLY DISCONTINUED OR DISMISSED COMPANION CASES (cases in which it appears substantially similar evidence will be offered at trial or the same or related parties are present and the cases arise out of the same transaction or occurrence) IN THIS OR ANY OTHER COURT, INCLUDING STATE COURT?

___ YES ___ NO

(b) IF YES GIVE THE FOLLOWING INFORMATION:

COURT: ___

CASE NO: ___

ASSIGNED

JUDGE: ___

The court awarded appellees their costs incurred in connection with their motion for reassignment to the judge in the earlier action. Appellant argues that the District Court erred in granting sanctions on both of these grounds.

In light of our reversal of the District Court's grant of summary judgment for the appellees, we find that the taking of depositions during the pendency of the dispositive motion was not unreasonable behavior in violation of Fed. R. Civ. P. 11. Moreover, we seriously question whether Rule 11 sanctions may be imposed where, as here, a magistrate has denied a motion to quash the depositions and no appeal to the District Judge is taken from that order.

In agreeing with appellees that they were entitled to the sanctions attendant to appellees' motion for reassignment, the District Court stated:

[T]he Court will award the fees and costs attendant upon the defendants being required to transfer this case . . . to this Court's docket. The failure to note a prior related case, a

companion case on the filing papers, in violation of the rules of this Court and the clear directives of the form, was done without reasonable inquiry as to the facts or the law or rules applicable.

As examination of the discussion of this issue during the hearing on appellees' motions for attorney fees and costs reveals that the claim of appellees was that this case was in essence the *same* case as the 1983 case.³ Indeed in granting summary judgment on *res judicata* grounds, the court found it was the same case and thus fell within the second requirement on the form. However, as we have discussed above, neither case arose out of the lease. Rather, the 1983 case arose out of events occurring after the lease went into effect and before the earlier case was dismissed, and the present case arose out of events occurring after its dismissal. Thus, the cases did not arise out of the same transaction or occurrence. To find otherwise would negate our finding that the District Court erred in finding the present case to be barred by *res judicata*. However, this case falls under the second inquiry, for the evidence presented during the two cases is likely to be substantially similar.

³ Relevant portions of the record include the following statements by appellees' attorneys:

[T]here is no question that the plaintiff was well aware that they had previously filed the suit.

It was quite possible we could have gotten into this case sometime before finding out there was a previous suit. The local rule is there to make sure that neither the court nor the other parties are fooled by thinking that they're dealing with something brand new

[T]he plaintiff made a misstatement on the cover sheet of the complaint saying that no other case had ever been filed, and of course it had been, the 1983 case was almost exactly what this case was, and that necessitated a motion being filed. The complaint itself was the same exact complaint as 1983.

First of all, there's no question but that when this case was prepared by the plaintiff, Your Honor, that they were aware that they had filed a claim that was the identical claim that was filed in 1983.

It is possible to read the cover sheet inquiry as requiring that the case also "arise out of the same transaction or occurrence." A reading of the rule itself clarifies this issue. Local Rule 8c.1 provides:

c. Assignment of Identical or Similar Cases.

(1.) Companion cases will normally be heard by the Judge having the case with the lowest filing number. Companion cases are those cases in which it appears that:

(i) Substantially similar evidence will be offered at trial, or

(ii) The same or related parties are present, and the cases arise out of the same transaction or occurrence.

Cases may be companion cases even though one of them may have already terminated.

Fed. Local Ct. Rules. E.D. Mich. Rule 8(c)(1) (1984).

If counsel had quesitons as to the meaning of the form, it was his obligation to read the rule.

Accordingly, we REVERSE the District Court's grant of summary judgment to appellees and the sanctions attendant to the taking of depositions, and AFFIRM the grant of sanctions attendant to appellees' motion for reassignment.

APPENDIX B

B-1

No. 90-1005

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN,

Plaintiff-Appellant

vs.

RICK KAY, ET AL.,

Defendants-Appellees

THE CITY OF DETROIT,

Defendant

ORDER

Filed: April 6, 1990

Upon consideration of the motion of the appellees to stay issuance of the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and hereby is granted for a period not to exceed thirty (30) days of the date herein.

ENTERED BY ORDER OF

THE COURT

Leonard Green, Clerk

/s/ LEONARD GREEN,

Clerk

APPENDIX C

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN,

Plaintiff-Appellant,

v.

RICK KAY, ET AL.,

Defendants-Appellees,

CITY OF DETROIT,

Defendant.

FILED: MARCH 8, 1990

Before: KENNEDY and NELSON, Circuit Judges; and
WISEMAN, Chief District Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the said district court's grant of summary judgment to appellees and the sanctions attendant to the taking of depositions be reversed. IT IS FURTHER ORDERED that the grant of sanctions attendant to appellees' motion for reassignment by the said district court be affirmed.

Each party is bear its own costs on appeal.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN,
Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: May 10, 1990

COSTS: NONE

Filing fee\$
Printing\$
Total\$

APPENDIX D



United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.,
OF MICHIGAN,

Plaintiff,

v.

RICK KAY, ET AL.,

Defendants.

CIVIL ACTION NO.
87 CV 70397 DT

DEFENDANT PROPHET PRODUCTIONS' MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, September 21, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes,
Prophet Productions, Tinik, Bannon, and The
Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and
Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: The Court is going to grant the defendant's motion for summary judgment because the Court does find that the doctrine of *res judicata* is applicable to this case. That doctrine is applicable when the first of the 2 actions filed was decided on the merits and when the matters contested in the second action were decided in the first; or, put another way, when the matters in the 2 actions arise out of a common nucleus of facts or out of the same transaction, and when the 2 actions were between the same parties and their privies.

This Court entered an order of dismissal with prejudice in November of 1983 in the previous lawsuit concerning the questions before it now. The Court is advised at this time that the stipulation on which the order of dismissal was based had been entered as a result of a settlement agreement between the parties. Apparently, they are depriving some access to the plaintiff to Joe Louis Arena and Cobo Hall.

The matters contested in the 1987 case are identical to those which were adjudicated by this Court in the 1983 action. The 2 actions are identical in that the plaintiff, a theatrical employment agency, or booking agency, alleges that an exclusive lease agreement between the defendant Prophet Productions, Olympia Stadium and Olympia Arenas has denied plaintiff access to Cobo Hall and Joe Louis Arena which the plaintiff alleges are essential facilities in this relevant market area. The plaintiff is claimed to have been charged discriminatorily high rental rates pursuant to this unlawful course of action.

In both complaints, the relevant geographic market is the tricounty Detroit metropolitan area, and Joe Louis and Cobo are alleged to be essential facilities within that market.

Both cases allege that the lease agreement which the defendants entered some years ago, in 1978, violates the Sherman Act, Sections 1 and 2, and in both lawsuits damages have been requested, and injunctive relief.

Defendant Prophet Productions was a named party in both actions too. The 1987 case has named individual defendants who

are the principals of the corporate defendants, and the 1987 case has added the City of Detroit as a defendant.

However, there is 1 common nucleus of facts in the entire set of litigation of 2 pieces of litigation, so the Court finds that inasmuch as it has entered its order of dismissal with prejudice of the case, there is no new cause of action that's alleged to have arisen subsequent thereto, and the Court must grant the defendant's dismissal on the basis of *res judicata*.

Please submit an order.

APPENDIX E

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN, a Michigan
corporation,

Plaintiff,

vs.

RICK KAY, ROBERT FOX, ROBERT
CAVALIERI, CHARLES FORBES,
MICHAEL ILITCH, OLYMPIA
STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation;
PROPHET PRODUCTIONS LTD.,
a Michigan corporation,
MICHAEL TINIK,
VINCENT BANNON, and
THE BUILDING GROUP,
CITY OF DETROIT,

Defendants.

CASE No.
87CV70397 DT

HON. ANNA DIGGS
TAYLOR

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ALAN C. HARNISCH (P14654)
ALAN M. GERSHEL (P29652)
Attorney for Defendants
ROBERT CAVALIERI,
MICHAEL ILITCH AND
OLYMPIA ARENAS, INC.
2000 Town Center, Suite 1500
Southfield, MI 48075
(313) 353-7620

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF DEFENDANT
PROPHET PRODUCTIONS, LTD.**

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 16th day of October, 1987

**PRESENT: THE HONORABLE ANNA DIGGS
TAYLOR**

U.S. District Court Judge

This matter having been brought on by Motion of Defendant, Prophet Productions, Ltd., and the respective parties thereto having filed pleadings, and the Court having heard the arguments of counsel in open Court and the Court being otherwise advised in the premises;

For the reasons set forth on the record by the Court at the hearing conducted on September 21, 1987, the Motion of Summary Judgment of Defendant, Prophet Productions, Ltd. is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR

U.S. District Court Judge

APPROVED AS TO FORM:

/s/ STEVEN M. KRAMER

STEVEN M. KRAMER

Attorney for Plaintiff

/s/ STEVEN J. WEISS

STEVEN J. WEISS

Of Counsel for Plaintiff

A TRUE COPY

By /s/ SHERRY STAMP

SHERRY STAMP

Deputy Clerk

APPENDIX F

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.,
OF MICHIGAN,

Plaintiff,

v.

RICK KAY, ET AL.,

Defendants.

CIVIL ACTION NO.
87 CV 70397 DT

DEFENDANTS' KAY, FOX AND TINIK MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
STEVEN J. WEISS, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes,
Prophet Productions, Tinik, Bannon, and The
Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and
Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: All right. Thank you.

The Court is going to grant the defendants' Fox, Tinik and Kay motion for summary judgment on the basis of the doctrine of *res judicata*. The first action between these parties or their privies was decided on the merits. A voluntary dismissal with prejudice was entered by this Court in November of 1983. The matters contested in the second action were decided by the first dismissal with prejudice, and are identical today. They concern an exclusive lease agreement between defendant Prophet Productions, d/b/a Brass Ring, Olympia Stadium and Olympia Arena, which was alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena, and in which the plaintiff claims to have been charged discriminatorily high rental rates.

In both cases the relevant geographic market is the tricounty-Detroit metropolitan area, and both cases allege that the lease agreement violates the Sherman Act, Sections 1 and 2, together with the implementation of the lease agreement.

The relief requested in both are injunctive relief and damages.

The 2 actions were also between the same parties or their privies. The 1983 action was against the corporate entities; the 1987 action is against the same corporate defendants as well as these individual principals of the corporate defendant.

So on the basis of the *res judicata* doctrine as applied in the Sixth Circuit, which gives full binding effect to the voluntary dismissal with prejudice the Court will grant the motion.

APPENDIX G



In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN, a Michigan
corporation,

Plaintiff.

vs.

RICK KAY, ROBERT FOX, ROBERT
CAVALIERI, CHARLES FORBES,
MICHAEL ILITCH, OLYMPIA
STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation;
PROPHET PRODUCTIONS LTD.,
a Michigan corporation,
MICHAEL TINIK,
VINCENT BANNON, and
THE BUILDING GROUP,
CITY OF DETROIT,

Defendants.

CASE NO.

87CV70397 DT

HON. ANNA DIGGS
TAYLOR

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AND THE BUILDING GROUP
CO-COUNSEL FOR
DEFENDANTS
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ALAN C. HARNISCH (P14654)
ALAN M. GERSHEL (P29652)
Attorney for Defendants
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MICHAEL ILITCH AND
OLYMPIA ARENAS, INC.
2000 Town Center, Suite 1500
Southfield, MI 48075
(313) 353-7620

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF DEFENDANTS,
RICK KAY, ROBERT FOX AND MICHAEL TINIK.**

At a session of said Court, held in the United States
Courthouse, in the City of Detroit, State of Michigan, on
the day of October, 1987

PRESENT: THE HONORABLE

U.S. District Court Judge

This matter having been brought on by Defendants, Rick
Kay, Robert Fox and Michael Tinik, and the respective parties
thereto having filed pleadings, and the Court having heard the
arguments of counsel in open Court and the Court being other-
wise advised in the premises;

For the reasons set forth upon the record of the Court at the
hearing conducted on October 19, 1987, the Motion for Summary
Judgment of Defendants Rick Kay, Robert Fox and Michael
Tinik is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR

U.S. District Court Judge

OCT 29 1987

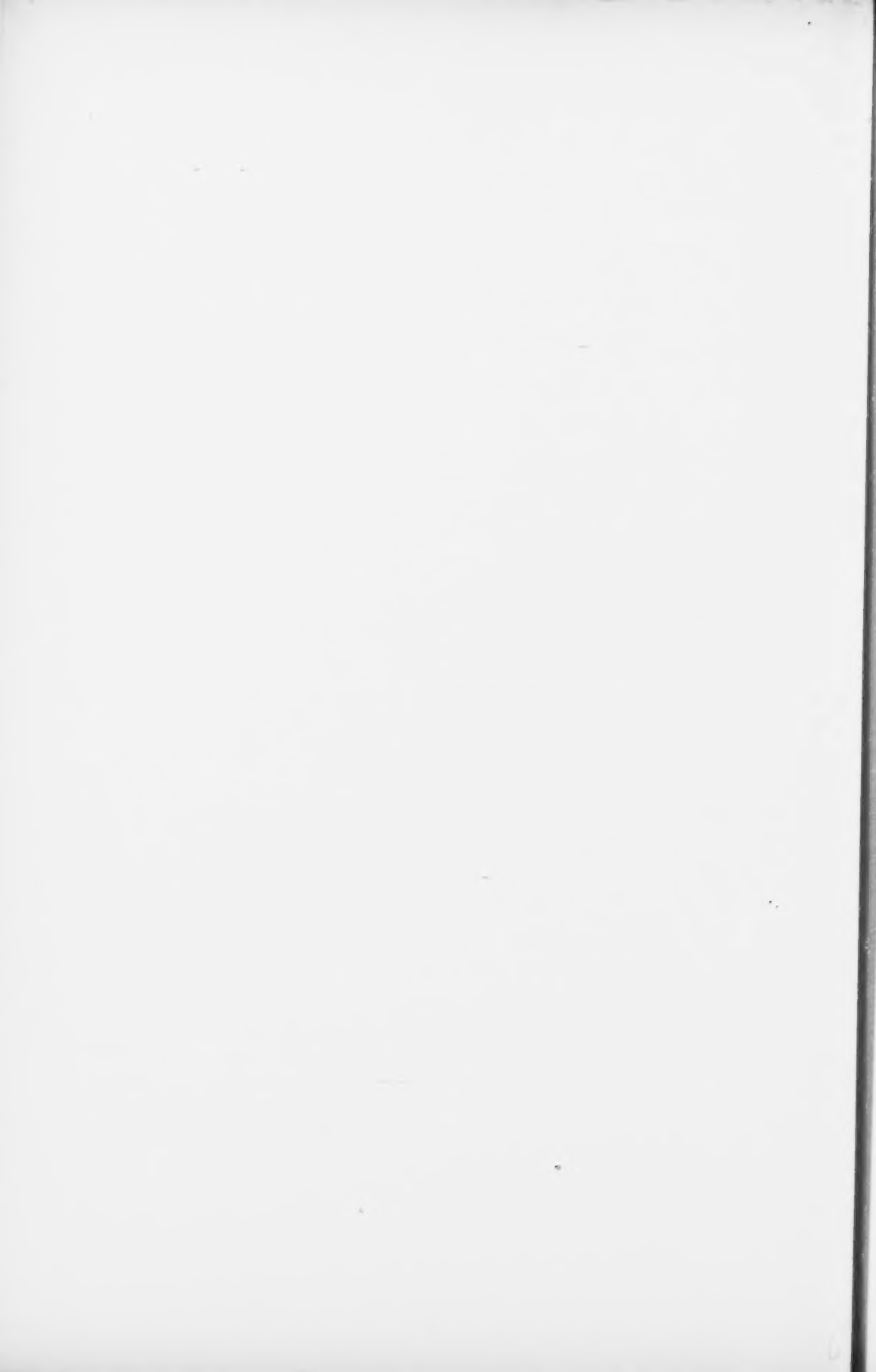
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/s/ SARA BALLINGER

Clerk



APPENDIX H



United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.,
OF MICHIGAN,

Plaintiff,

v

RICK KAY, et al.,

Defendants.

CIVIL ACTION NO.
87 CV 70397 DT

DEFENDANTS' OLYMPIA, CAVALIERI AND ILLITCH MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,

STEVE J. WEISS, ESQ.,

On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,

On behalf of Defendants Kay, Fox, Forbes,
Prophet Production, Tinik, Bannon, and The
Building Group.

ALAN C. HARNISCH, ESQ.,

On behalf of Defendants Cavalieri, Illitch and
Olympia.

CHARLES A. MOORE, ESQ.,

On behalf of Defendant City of Detroit.

THE COURT: The Court will grant the defendants' motion for summary judgment. It is undisputed that defendant Michael Illitch is a principal of the Olympia defendants, and defendant Cavalieri was the manager of the Olympia facilities Joe Louis Arena and Cobo Arena, and they are the added defendants in this 1987 lawsuit, and the only factor that distinguished the 1987 lawsuit from the 1983 case which the defendants and the plaintiffs together dismissed with prejudice in 1983.

The Court will grant the motion for dismissal for *res judicata* for the reasons that have been argued here, and for the reasons that the Court has stated on the past 2 motions.

APPENDIX I

,

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN, a Michigan
corporation,

Plaintiff,

vs.

RICK KAY, ROBERT FOX, ROBERT
CAVALIERI, CHARLES FORBES,
MICHAEL ILITCH, OLYMPIA
STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation;
PROPHET PRODUCTIONS LTD.,
a Michigan corporation,
MICHAEL TINIK,
VINCENT BANNON, and
THE BUILDING GROUP,
CITY OF DETROIT,

Defendants.

CASE No.

87CV70397 DT

HON. ANNA DIGGS
TAYLOR

STEVEN M. KRAMER
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T. PATRICK FREYDL (P13705)
ATTORNEY FOR DEFENDANTS
RICK KAY, ROBERT FOX,
CHARLES FORBES,
MICHAEL TINIK,
VINCENT BANNON,
PROPHET PRODUCTIONS, LTD.
AND THE BUILDING GROUP
CO-COUNSEL FOR
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MICHAEL ILITCH AND
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(313) 353-7620

**ORDER GRANTING MOTION FOR SUMMARY
JUDGMENT OF DEFENDANTS, OLYMPIA
ARENAS, INC., A MICHIGAN CORPORATION,
ROBERT CAVALIERI AND MICHAEL ILITCH**

At a session of said Court, held in the United States
Courthouse, in the City of Detroit, State of Michigan, on
the day of October, 1987

**PRESENT: THE HONORABLE ANNA DIGGS
TAYLOR**
U.S. District Court Judge

This matter having been brought on by Defendants, Olympia
Arenas, Inc., a Michigan corporation, Robert Cavalieri and
Michael Ilitch and the respective parties thereto having filed

pleadings, and the Court having heard the arguments of counsel in open Court and the Court being otherwise advised in the premises;

For the reasons set forth upon the record of the Court at the hearing conducted on October 19, 1987, the Motion for Summary Judgment of Defendants, Olympia Arenas, Inc., a Michigan corporation, Robert Cavalieri and Michael Ilitch, is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR

U.S. District Court Judge

OCT 29, 1987

A TRUE COPY

/s/ SARA BALLINGER

Clerk

APPENDIX J



United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN, a Michigan
corporation,

Plaintiff,

vs.

OLYMPIA STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation; and
PROPHET PRODUCTIONS LTD.,
a Michigan corporation

Defendants.

No. 83-CV2560-DT
HON. ANNA
DIGGS TAYLOR

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their respective counsel, that the above captioned cause be dismissed with prejudice and without costs to either party.

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

BY /s/ JEFF M. LIPSHAW

HOWARD E. O'LEARY P-18461

JEFFREY M. LIPSHAW P-30713

Attorneys for Plaintiff

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FRIMET, BELLAMY, GILCHRIST &
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BY /s/ JAMES R. LITES
JAMES R. LITES P-29265

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SOLOMON, FOLEY & MORAN

BY /s/ RICHARD A. SOLOMON (JRL)
RICHARD A. SOLOMON
P-20777

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FREYDL & MAXWELL

BY /s/ T. PATRICK FREYDL
T. PATRICK FREYDL P-13075

*Attorneys for Defendant,
Prophet Productions, Ltd.
30200 Telegraph Road, Suite 221
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ORDER OF DISMISSAL

At a regular session of said Court held in the U.S. District
Courthouse, Detroit, Michigan on 3 NOV 1983

PRESENT: HON. ANNA DIGGS TAYLOR
U.S. District Court Judge

The parties hereto having stipulated to dismissal of the above
captioned matter, and the Court having been fully advised in the
premises,

IT IS HEREBY ORDERED that the above captioned
matter be and the same hereby is dismissed with prejudice and
without costs to either party.

/s/ ANNA DIGGS TAYLOR
U.S. District Court Judge



APPENDIX K



United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN,
a Michigan corporation,

Plaintiff,

vs.

OLYMPIA STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation; and
PROPHET PRODUCTION LTD.,
a Michigan corporation,

Defendants.

CIVIL ACTION No.
83CV2560 DT

HON. ANNA DIGGS
TAYLOR

Howard E. O'Leary (P18461)

Jeffrey M. Lipshaw (P30713)

Attorneys for Plaintiff

VERIFIED COMPLAINT

Plaintiff Cellar Door Productions, Inc. of Michigan, by its attorneys Dykema, Gossett, Spencer, Goodnow & Trigg, for its complaint against defendants states as follows:

1. Plaintiff Cellar Door Productions, Inc. of Michigan ("Cellar Door"), is a Michigan corporation with its principal place of business in the City of Southfield, Michigan. Plaintiff Cellar Door is licensed under the laws of the State of Michigan as a theatrical employment agency. Plaintiff Cellar Door is engaged in the business of promoting and producing arena attraction musical events for presentation at Cobo Arena, Joe Louis Arena

and elsewhere. An arena attraction musical event is an event featuring an individual musical performer or musical group believed to be capable of selling approximately 7,500-20,000 seats for one performance and requiring a financial guarantee of from \$15,000 to \$100,000 for one performance.

2. Defendant Olympia Stadium Corporation ("Stadium") and defendant Olympia Arenas, Inc. ("Arenas") are Michigan corporations with their principal place of business in Detroit, Michigan. Defendant Stadium leases and operates two facilities in Detroit, Michigan known as Cobo Arena, located at 301 Civic Center Drive, Detroit, Michigan, and Joe Louis Arena, located at 600 Civic Center Drive, Detroit, Michigan, pursuant to a master lease agreement, dated August 16, 1978, with the City of Detroit. Upon information and belief, defendant Arenas is an affiliate of defendant Stadium, which leases Cobo Arena and Joe Louis Arena to Cellar Door and others for the promotion and production of musical events and other events.

3. Defendant Prophet Production Ltd. is a Michigan corporation doing business under the trade name Brass Ring Productions with its principal place of business in Birmingham, Michigan. For purposes of this complaint, the defendant Prophet Production Ltd. will be referred to under its trade name, Brass Ring Productions ("Brass Ring"). Brass Ring is licensed under the laws of the State of Michigan as a theatrical employment agency. Defendant Brass Ring is also engaged in the business of promoting and producing musical events for presentation at Cobo Arena, Joe Louis Arena and elsewhere.

Jurisdictional Allegations

4. This court has jurisdiction over the defendants by reason of the fact that each of them carries on a continuous and systematic part of their general business within the State of Michigan and are incorporated in the State of Michigan.

5. This court has jurisdiction of the action because the amount in controversy exceeds the sum or value of Ten Thousand

Dollars (\$10,000.00), exclusive of interest and costs, and arises under the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2, Clayton Act §§ 4 and 16, 15 U.S.C. §§ 16 and 26, as to Counts I and II, which satisfies the jurisdictional requirements set forth in 28 U.S.C. §§ 1331 and 1337.

6. Venue in this court over this action lies pursuant to 15 U.S.C. § 26, 28 U.S.C. § 1391, 15 U.S.C. § 22.

Interstate Commerce

7. All of the parties in this action are engaged in commerce and engaged in activities affecting commerce among the several states within the meaning of §§ 1 and 2 of the Sherman Act.

Factual Allegations

8. Plaintiff Cellar Door and defendant Brass Ring are direct horizontal competitors in the promotion and production of arena attraction musical events in the Tri-County Detroit area of Wayne, Oakland and Macomb counties in the State of Michigan.

9. The Tri-County Detroit area is the relevant geographic market in this action.

10. The promotion and production of arena attraction musical events in the Tri-County Detroit area is the relevant line of commerce in this action.

11. There are a limited number of facilities in the Tri-County Detroit area that are suitable for the promotion and production of arena attraction musical events because of seating capacity, economic feasibility, acoustics and for other reasons.

12. Cobo Arena and Joe Louis Arena are essential facilities for the promotion and production of arena attraction musical events in the Tri-County Detroit area because of seating capacity, economic feasibility, acoustics and for other reasons. Cobo Arena and Joe Louis Arena are also the only year-round suitable facilities economically feasible for the promotion and production

of such events, to which Cellar Door has access in the Tri-County Detroit area.

13. As a result of defendant Stadium's August 16, 1978 master lease agreement with the City of Detroit, defendants Stadium and Arenas have the exclusive right to lease Cobo Arena and Joe Louis Arena for the promotion and production of such events.

14. Defendants Stadium and Arenas have entered into an exclusive agreement with defendant Brass Ring to promote and produce arena attraction musical events at Cobo Arena and Joe Louis Arena. The effect of this agreement is to deny Cellar Door access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events except on terms which are discriminatory and less favorable than the terms offered to Brass Ring for such facilities for such events. As a result, Brass Ring is able to offer performers and groups of performers more compensation for such events at Cobo Arena and Joe Louis Arena. As a result of such agreement, Brass Ring is also able to advertise such events for a longer period prior to the date tickets for such events are offered for sale. Upon information and belief, defendants Stadium and Arenas have also conspired among themselves and with defendant Brass Ring to refuse to deal with Cellar Door, except on discriminatory and unfavorable terms to Cellar Door.

15. In May 1983, Cellar Door requested that Stadium and Arenas grant Cellar Door access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events on the same terms as those granted to Brass Ring for such facilities for such events, and Cellar Door has not been granted access to such facilities on such equal terms.

16. As a result of the refusal by Stadium, Arenas and Brass Ring to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of arena attraction musical events, and as a result of the concerted refusal by Stadium, Arenas and Brass Ring to deal on such equal terms,

Cellar Door has suffered and continues to suffer injury in its business and property by being foreclosed from competing effectively with Stadium, Arenas and Brass Ring for the promotion and production of such events at Cobo Arena and Joe Louis Arena and elsewhere.

17. Cellar Door has suffered and continues to suffer injury in its business and property by being unable to offer individual musical performers and musical groups access to Cobo Arena and Joe Louis Arena on terms as favorable as those offered such performers by Stadium, Arenas and Brass Ring. Cellar Door has also suffered injury to its business and property because of the more favorable terms granted Brass Ring for the advertising of such events at Cobo Arena and Joe Louis Arena. As a result, Cellar Door has lost profits by being foreclosed from competing effectively for the promotion and production of arena attraction musical events at Cobo Arena and Joe Louis Arena and elsewhere featuring the following performers: (1) Styx, (2) Journey, (3) Stevie Nicks, and (4) Supertramp.

18. As a result of being foreclosed from competing effectively for the promotion and production of arena attraction musical events at Cobo Arena and Joe Louis Arena featuring the above performers, Cellar Door has also suffered injury in its business and property by virtue of the loss of goodwill and reputation among the above performers, and among other individual musical performers and musical groups and other persons.

19. The conduct of defendants Stadium, Arenas and Brass Ring, recently just begun, is continuing and will continue unless the injunctive relief as requested herein is granted.

20. Unless this court enjoins the defendants Stadium, Arenas and Brass Ring, their respective affiliates, their officers, agents, servants, employees, attorneys and those other persons in active concert or participation with them from collectively refusing to grant access to Cobo Arena and Joe Louis Arena on such equal terms and collectively refusing to deal on such terms, plaintiff Cellar Door will suffer the loss of goodwill and the loss of

reputation among performers and groups of performers and other persons, all to the immediate and irreparable injury of plaintiff. The extent of the injury is impossible to determine because the true value of Cellar Door's goodwill cannot be accurately quantified and plaintiff therefore has no adequate remedy at law.

COUNT I

(Violation of 15 U.S.C. § 1)

21. The allegations of ¶¶ 1-20 are incorporated herein by reference.

22. The exclusive arrangement among the defendants Stadium, Arenas and Brass Ring which denies Cellar Door access to the essential facilities of Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events except on discriminatory and unfavorable terms to Cellar Door, unreasonably forecloses competition in the relevant market and is illegal under Sherman Act, § 1, 15 U.S.C. § 1.

23. On information and belief, the conspiracy among defendants to refuse to deal with Cellar Door except on terms which are discriminatory and less favorable to Cellar Door is illegal per se under Sherman Act § 1, 15 U.S.C. § 1.

24. Plaintiff Cellar Door is threatened pursuant to Clayton Act, §§ 4, 16, 15 U.S.C. §§ 15, 26 with immediate and irreparable loss and damage to its business and property as a result of the unlawful conduct alleged and lacks an adequate remedy at law.

COUNT II

(Violation of 15 U.S.C. § 2)

25. The allegations of ¶¶ 1-20 are incorporated herein by reference.

26. The defendants Stadium and Arenas possess monopoly power in the market for facilities suitable for the promotion and production of arena attraction musical events in the Tri-County Detroit area because: (1) Cobo Arena and Joe Louis Arena are

essential facilities for the promotion and production of such musical events, and (2) the master lease agreement, dated August 16, 1978, between the defendant Stadium and the City of Detroit grants the defendants Stadium and Arenas the exclusive right to lease such facilities. By its agreement with the defendants Stadium and Arenas, Brass Ring is the beneficiary of Stadium and Arena's monopoly power.

27. The defendants have abused Stadium and Arena's monopoly power in the market for facilities suitable for the promotion and production of arena attraction musical events in the Tri-County Detroit area by foreclosing, restraining and excluding effective competition in a related market, namely; the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area. The defendants have foreclosed, restrained and excluded effective competition in the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area by refusing to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of such events, all in violation of Sherman Act, § 2, 15 U.S.C. § 2.

28. The defendants Stadium and Arenas have combined and conspired among themselves and with the defendant Brass Ring to monopolize and to attempt to monopolize the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area by refusing to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of such events, all in violation of Sherman Act, § 2, 15 U.S.C. § 2.

WHEREFORE, Plaintiff prays:

(i) That the Court issue Preliminary and Permanent Injunctions enjoining Defendants, their affiliates, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, from directly or indirectly:

(a) refusing to grant plaintiff access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events on equal terms;

(b) refusing to deal with plaintiff on terms similar to those received by defendant Brass Ring; and

(ii) that a judgment be entered against the defendants Stadium, Arenas and Brass Ring for an amount not precisely known at present but in excess of \$10,000 with interest thereon for the damages suffered to date by plaintiff, together with the costs and disbursements of this action and the award of reasonable attorneys' fees; and

(iii) that the Court grant plaintiff such other and further relief as may be just.

Respectfully submitted,
DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

By /s/ HOWARD E. O'LEARY (IM)
Howard E. O'Leary (P18461)

And:

By /s/ JEFFREY M. LIPSHAW
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June 28, 1983

APPENDIX L

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COMPLAINT
JURY TRIAL DEMANDED
PLAINTIFF'S REQUEST FOR
PRODUCTION OF DOCUMENTS — SET I

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN, a Michigan
corporation,

Plaintiff,

-v-

RICK KAY, ROBERT FOX, ROBERT
CAVALIERI, CHARLES FORBES,
MICHAEL ILLITCH, OLYMPIA
STADIUM CORPORATION,
a Michigan corporation;
OLYMPIA ARENAS, INC.,
a Michigan corporation;
PROPHET PRODUCTIONS LTD.,
a Michigan corporation,
MICHAEL TINIK,
VINCENT BANNON, and
THE BUILDING GROUP,
CITY OF DETROIT,

Defendants.

CIVIL ACTION

CASE No.
87CV70397 DT

HON. ANNA DIGGS
TAYLOR

JURY TRIAL
DEMANDED

COMPLAINT

COUNT ONE

VIOLATION OF SHERMAN ACT, SECTION TWO MONOPOLIZATION

Plaintiff Cellar Door Productions, Inc. of Michigan, by its
attorneys Steven M. Kramer and Steve J. Weiss for its complaint
against defendants states as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted to secure treble damages and injunctive relief, as provided for in §§ 4 and 16 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (codified as 15 U.S.C. §§ 15 and 26) and commonly referred to as §§ 4 and 16 of the Clayton Act, from the above-named defendants for their violations of § 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (codified as 15 U.S.C. § 2), commonly known as the Sherman Act.

2. Jurisdiction as to these claims is vested in this Court by the Act of Congress of June 25, 1948, c. 646, §2, 62 Stat. 931 (codified as 28 U.S.C. §1337).

3. Each of the defendants herein is found or transacts business in this District, the unlawful activities hereinafter alleged were performed, in part, within this District; and the interstate trade and commerce hereinbelow described is carried on, in part, within this District.

II. THE PARTIES

4. Plaintiff Cellar Door Productions, Inc. of Michigan ("Cellar Door"), is a Michigan corporation with its principal place of business in the City of Southfield, Michigan. Plaintiff Cellar Door is engaged in the business of promoting and producing contemporary music concerts in the Detroit area.

5. Defendant Olympia Stadium Corporation ("Stadium") and defendant Olympia Arenas, Inc. ("Arenas") are Michigan corporations with their principal place of business in Detroit, Michigan. Defendant Stadium leases and operates two facilities in Detroit, Michigan known as Cobo Arena, located at 301 Civic Center Drive, Detroit, Michigan, and Joe Louis Arena, located at 600 Civic Center Drive, Detroit, Michigan, pursuant to a master lease agreement, dated August 16, 1978, with the City of Detroit. Upon information and belief, defendant Arenas is an affiliate of defendant Stadium, which leases Cobo arena and Joe Louis

Arena for the promotion and production of musical events and other events.

6. Defendant Prophet Productions Ltd. is a Michigan corporation doing business under the trade name Brass Ring Productions with its principal place of business in Birmingham, Michigan. For the purposes of this complaint, the defendant Prophet Productions Ltd. will be referred to under its trade name, Brass Ring Productions ("Brass Ring"). Defendant Brass Ring is engaged in the business of promoting contemporary concerts in the Detroit area.

7. Defendants Rick Kay, Robert Fox and Michael Tinik are principals of Brass Ring Productions. On behalf of themselves and Brass Ring, they engaged in some of the acts complained of herein.

8. Defendant Michael Illitch is a principal of the Olympia defendants and engaged in acts herein complained of.

9. Defendant Cavalieri, during all times relevant hereto was the manager of the Olympia facilities, Joe Louis Arena and Cobo Arena and engaged in acts herein complained of.

10. Defendant Forbes is the owner of the State, Fox and Gem Theatres and engaged in acts herein complained of.

11. Defendant City of Detroit entered into exclusive leases with the Olympia defendants for the operation of Cobo Arena and Joe Louis Arena.

12. Defendant Bannon is a principal in an affiliate of defendant Brass Ring and engaged in acts herein complained of. In addition, Bannon has an exclusive with a facility known as St. Andrews, for upon information and belief, the benefit of Brass Ring.

12A. The Building Group is, upon information and belief, a joint venture of defendants Olympia Arenas and Brass Ring and engaged in acts herein complained of.

III. INTERSTATE COMMERCE

13. The presentation of concerts by the parties and others occurs in interstate commerce.

(a) Virtually all of the artists who perform at said events cross state lines to do so, generating gross revenue for U.S. promoters in excess of \$50,000,000.00 per annum.

(b) Many of the contractual relationships between promoters and artists for the performance of concerts in the Detroit Metropolitan Area are entered into in New York City and Los Angeles.

(c) Much of the sound and lighting equipment used in the presentation of the concerts are purchased from out of state.

(d) Many of the acts are performed by the defendants in interstate commerce.

IV. DEFINITIONS

14. Promoter — As used herein, the term "promoter" is defined as a person who presents live musical entertainment events (hereinafter referred to "concerts"). Concerts are performed by artists. In order to promote a concert, a promoter conducts, *inter alia*, the following activities:

(a) purchases the services of an artist;

(b) contracts with an artist, his manager, or his agent to obtain that artist's services for a particular location, facility, date and time;

(c) contracts with the owner of a facility in which the concert is to take place;

(d) sells tickets to the public, either directly or through ticket outlets;

(e) advertises the concert;

(f) performs various other activities, all of which are designed to successfully present the concert event to the public.

15. Artist — An artist is a musical recording artist. In the relevant product markets and sub-markets described herein, an artist usually has a recording contract with a record company. Typically, artists are usually categorized as follows:

- (a) rock artist;
- (b) M-O-R (middle of the road) artist;
- (c) R & B Artist
- (d) country and western artist

IV. THE RELEVANT PRODUCT MARKET AND THE RELEVANT GEOGRAPHIC MARKET

16. The relevant product market consists of the promotion of contemporary concerts. Within that market are, *inter alia*, the following relevant sub-markets:

- (a) Promotion of concerts at the arena level;
- (b) Promotion of concerts at the middle level;
- (c) Promotion of concerts at the "club" level.

Within that market there are also the following sub-markets:

- (a) rock concerts
- (b) R&B concerts
- (c) country and western concerts
- (d) M-O-R concerts

17. The relevant geographic market is the Detroit Metropolitan Area.

V. MONOPOLY POWER

18. Defendants Olympia, and defendant City have monopoly power in the rental of arena level concert facilities as a result of an agreement entered into between the City and the Olympia defendants which grants the Olympia defendants the exclusive right to lease Joe Louis Arena and Cobo Arena.

19. Both the Cobo Arena and the Joe Louis Arena are essential facilities in the market for the promotion of arena level concerts.

20. Defendants Brass Ring, Kay and Fox, hereinafter Brass Ring, have monopoly power in the promotion of concerts at the arena level, middle level and club level.

21. The defendants have obtained this monopoly not through superior business acumen but rather through the acquisition of exclusive leases at essential facilities in each sub-market.

22. At the arena level, the Brass Ring defendants have an exclusive at the Joe Louis Arena and Cobo Arena. Plaintiff is precluded from renting those facilities on rental terms that would enable plaintiff to compete against Brass Ring. The Olympia defendants (Olympia, The Building Group, Illitch and Cavalieri) have imposed discriminatorily high rental terms upon the plaintiff that make it impossible for plaintiff to compete against Brass Ring, and has thereby denied access to plaintiff on terms equal to that afforded to Brass Ring.

23. At the middle level, the Brass Ring defendants have monopoly power through the acquisition of exclusive leases at the State Theatre, the Fox Theatre, and Royal Oak Music Theatre.

24. The State and Fox theatres are essential facilities on the middle level sub-market.

25. Defendant Forbes through his ownership of the State and Fox Theatres has monopoly power in the rental of middle level concert facilities.

26. Plaintiff has been denied access to said facilities.

27. At the lower level of club level sub-market, Brass Ring has monopoly power through the acquisition of an exclusive lease at the St. Andrews Theatre.

28. St. Andrews is an essential facility in the lower level or club market.

29. Plaintiff has been denied access to said facility.

30. In addition Brass Ring has interfered with plaintiff's contracts including but not limited to plaintiff's contract with the University of Michigan for the rental of Hill Auditorium.

VI. DAMAGES

31. As a result of the foregoing, plaintiff has been damaged in the amount in excess of \$500,000.00.

32. Plaintiff is suffering irreparable harm as a result of the foregoing conduct.

VII. VIOLATION

33. The foregoing conduct violates Section Two of the Sherman Act, 15 U.S.C. Sec. 2.

COUNT TWO VIOLATION OF THE SHERMAN ACT, SECTION TWO ATTEMPTED MONOPOLIZATION

34. Paragraphs 1-33 are re-alleged as if set forth in full.

35. The foregoing conduct constitutes attempted monopolization.

**COUNT THREE
VIOLATION OF SHERMAN ACT,
SECTION TWO
CONSPIRACY TO MONOPOLIZE**

36. Paragraphs 1-35 are re-alleged as if set forth in full.

37. The defendants did conspire amongst themselves and others to monopolize the relevant product sub-markets.

**COUNT FOUR
VIOLATION OF THE SHERMAN ACT,
SECTION ONE
CONSPIRACY IN UNREASONABLE RESTRAINT
OF TRADE**

38. Paragraphs 1-37 are re-alleged as if set forth in full.

39. The defendants conspired to unreasonably restrain trade in the promotion of concerts in the relevant sub-markets.

40. The conspiracy consisted of refusing to allow plaintiff access to the referenced facilities on equal terms, interference with prospective and actual contracts of the plaintiff and similar acts.

41. As a result of the foregoing, competition has been unreasonably restrained, in that, among other things:

a. the concert going public has been deprived of the services offered by plaintiff at the foregoing facilities.

b. artists have been deprived of the benefits of competition in the bidding for talent by plaintiff.

c. defendants have gained a monopoly in the relevant sub-markets.

**COUNT FIVE
INTERFERENCE WITH CONTRACTUAL
RELATIONSHIP**

42. Paragraphs 1-41 are re-alleged as if set forth in full.

43. Jurisdiction is pendent.

44. In or about September of 1986 plaintiff entered into an agreement with the University of Michigan for the promotion of a concert at Hill Auditorium.

45. Defendant Brass Ring interfered with the contract by threatening or otherwise inducing the University of Michigan not to perform under the agreement.

46. The foregoing was done with the knowledge of plaintiff's contract rights, and was done intentionally, recklessly and maliciously.

WHEREFORE, PLAINTIFF DEMANDS THE FOLLOWING RELIEF:

A. JUDGMENT IN ITS FAVOR AGAINST EACH DEFENDANT JOINTLY AND SEVERALLY;

B. ACTUAL AND COMPENSATORY DAMAGES AS TO THE DEFENDANTS OTHER THAN THE CITY;

C. PUNITIVE DAMAGES AS TO THE DEFENDANTS OTHER THAN THE CITY;

D. TREBLE DAMAGES;

E. COSTS OF SUIT AND A REASONABLE ATTORNEY'S FEE;

F. PERMANENT INJUNCTIVE RELIEF;

G. SUCH OTHER AND FURTHER RELIEF AS THIS COURT MAY DEEM JUST;

H. PLAINTIFF DEMANDS TRIAL BY JURY.

Steven M. Kramer, Esquire
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ASSOCIATES

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APPENDIX M



In The United States District Court

**EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CELLAR DOOR PRODUCTIONS, INC.
OF MICHIGAN,

Plaintiff,

v.

RICK KAY, et al.,

Defendants.

CIVIL ACTION NO.
87 CV 70397 DT

DEFENDANT PROPHET PRODUCTIONS' MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, September 21, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes,
Prophet Production, Tinik, Bannon, and The
Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and
Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: Plaintiff.

MR. KRAMER: Good morning, Your Honor. Steven Karmar on behalf of the plaintiff.

Your Honor, 1 sentence disposes of this motion, and I won't burden the Court with any further statements. That 1 sentence is: *Lawlor versus National Screen Service Corporation*, 349 U.S. 322, (1955), cited in our supplemental papers, disposes of this motion. Shepardizing that 32-year-old case, one concludes that it has not been reversed. It has not been modified. It has ever even been distinguished by the Supreme Court.

That case, discussed at length in our supplemental papers, which Mr. Freydl during the 17 or 18 minutes he was up here failed to mention, is the only Supreme Court case in the United States that has held on this issue.

In that case, like this case, there was a prior suit.

In that case, like this case, there was an antitrust claim in both suits.

In that case, like this case, there was a dismissal with prejudice.

In that case, like this case, a subsequent suit was brought.

In that case, like this case, different time periods and, hence, different cause of actions were alleged —

THE COURT: Well, no, in that case, plaintiffs alleged that National Screen did not live up to its obligations under the settlement agreement, you say.

MR. KRAMER: In addition, Your Honor, and with regard to the antitrust causes of action, the plaintiff in the subsequent case alleged a different time period and the same type of conduct; namely, contending that the exclusive licenses granted to the defendant which were alleged to be unlawful in suit number 1 were also alleged to be unlawful in suit number 2.

Yes, there was a settlement agreement and, yes, the plaintiff in the second suit said they didn't live up to the settlement agreement which formed the basis of the dismissal with prejudice for sure. To be sure, Your Honor's absolutely correct. But with

regard to the antitrust claims, the allegations were exactly the same; namely, whether or not the exclusive licenses were legal. The only difference — and this was critical and determinative, as it will be here — is that different time periods were alleged.

And as Chief Justice Warren — and I won't bother to read it because Your Honor has it before you — said, "Different time periods, end of issue," reverses both lower courts and holds that *res judicata* does not apply, and in addition cites the very cogent policy grounds as to why it should not apply.

Shepardizing that case, the 2 cases that also involved antitrust issues and a prior lawsuit and either a dismissal with prejudice or an adverse ruling againsts the plaintiff again hold that *res judicata* does not apply when, as here, different time periods are alleged, and those cases I cite and I won't burden the Court with going over them now because they're set forth in detail.

But here, Your Honor, we are talking about unlawful conduct between 1983, the date of the dismissal with prejudice, and the date of the filing of this lawsuit. In suit number 1, we were talking about a different time period, the 4-year period before that filing of the lawsuit in '83. So you have 2 different time periods here, just like you did in *Lawlor*, just like you did in *General Electric*, and just like you did in the *Oberweis* decision.

In *Lawlor*, in *Oberweis*, and in *General Electric*, the courts held that because different time periods applied, summary judgment and *res judicata* were not applicable.

That's the end of the argument. Thank you, Your Honor.